

1. Cover Story

Immigration Law in Post-9/11 America

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By John Greenya Photographs by Howard Ehrenfeld

Recent legislation and government reorganization strive to make us more secure, but at what cost to our reputation as the land of the free?

One of the first questions raised in the aftermath of the September 11, 2001, terrorist attacks on New York and Washington was, How had the 19 terrorists been able to enter and stay in the United States while plotting their offensive? Six months later, when the news broke that the Immigration and Naturalization Service (INS) had approved the change-of-status (from tourist to student) visa applications of Mohammed Atta and Marwan al-Shehhi, the pilot-terrorists who had flown the planes into the World Trade Center, the nation's immigration policies came under fire. It appeared that the INS was dangerously inept.

Cries for abolition merged with demands for reform, and Congress passed several major pieces of legislation, including the USA PATRIOT Act and the Enhanced Border Security and Visa Entry Reform Act, which were followed by a number of executive orders and administrative decrees. Then on March 1, 2003, as a key part of the government's plan to enhance security, the INS, which had operated under the jurisdiction of the Department of Justice since 1941, became an agency of the newly created Department of Homeland Security.

Since the passage and initial implementation of these measures, there has been an intense debate over whether these new laws offer the best way to resolve the conflict between the need for increased security, on the one hand, and the characteristically American practice of welcoming immigrants, on the other. The debate is hardly new. For several decades there has been a widening gap between those who want to maintain the United States' open-borders policy and those who feel immigration needs to be sharply curtailed. There are also those who believe, like political commentator and presidential hopeful Patrick Buchanan, that the time has come to close the borders and declare a moratorium on all immigration.

"The challenge for the Administration and Congress," wrote one pro-immigration interest group in January 2002, "is to implement measures that will make our country more secure without turning away from our tradition as a nation of immigrants, and to keep closer watch on the home front without seriously damaging our reputation as the land of the free."

There is also a challenge for immigration lawyers, from the large firms that handle what used to be fairly routine immigration matters for big corporations to the solo practitioners who represent a wide variety of clients with immigration problems. For them the double-barreled effect of September 11 and the INS's new identity as part of the Department of Homeland Security has made a complex area of legal practice even more daunting. In December 2002 Jack Pinnix, president of the American Immigration Lawyers Association, called the situation an "emerging crisis," and he warned against "those who would use national security as a pretext to move a restrictionist agenda."

Immigration lawyers are now working in a very different climate. According to Michael Maggio, "A lot of people say that September 11 is the date that changed the practice of immigration law, but that's really not true. The date that changed the practice of immigration law was March 11, 2002, because that's the day the INS approved the change of visa classifications for the two hijackers who had been killed on September 11. And the way it changed everything is that whenever there is a question of whether a case ought to be approved or denied, it's going to be denied. No immigration official wants to be the one who lets in the next terrorist."

José Pertierra, a veteran immigration lawyer with a large Spanish-speaking clientele, puts it somewhat differently: "What we used to have in dealing with the INS was a culture of service. What we have now is a culture of no."

New Laws and Regulations

Hardly anyone disputes the fact that the changes are significant. According to the Congressional Research Service's summary of the law, the USA PATRIOT (an acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act "seeks to further close our borders to foreign terrorists and to detain and remove those within our borders."

To that end, the act includes new criteria for denying entry, expands the definition of terrorist activity, and adds that definition to the existing reasons for deportability. The act also gives the attorney general new power to detain "any person he certifies that he has reasonable grounds to believe" fits the descriptions provided in the Immigration and Nationality Act (INA).

Drafted and passed before the creation of the new Department of Homeland Security, the USA PATRIOT Act, which covers a number of areas, has several sections that deal with immigration. Among the chief provisions are the tripling of the border patrol on the U.S.–Canadian border; INS and Department of State access to the FBI's criminal record-keeping system for help in determining visa issuance and entry questions; a requirement for a standardized technology that can be used to verify the identity of foreign nationals seeking entry or visas; new grounds for denying or deporting persons "deemed to be representatives of foreign terrorist organizations or of any group that publicly endorses terrorist acts"; and directing the INS to use "biometric identifiers" (higher tech fingerprinting methods) and tamper-proof documents, and to implement fully the Foreign Student Visa Monitoring Program (established under the 1996 revision of the immigration laws).

Several aspects of the USA PATRIOT Act have caused great concern among immigration lawyers and civil rights groups. Chief among them is the power granted exclusively to the attorney general or the deputy attorney general to certify an alien as a terrorist if the attorney general or his deputy has "reasonable grounds to believe" that this alien is a terrorist or has committed an act of terrorism. Once a person is so certified, detention is mandatory.

Perhaps the most controversial aspect of the act, causing the loudest protests, is the charge for detaining aliens. Although the new law states that such a person must be released within seven days if not charged with a violation, the charge need not be for an act of terrorism. It may be for a minor infraction of the immigration laws, and not even one related to the alleged terrorist act. If a violation is found, the suspect may be held for an unspecified length of time.

The Border Security Act, introduced in November 2001 and signed into law just days later, focuses on enhanced security measures while continuing to allow for the ongoing entry of people as well as certain necessary or desirable goods and materials. To these ends, it authorizes money for more INS and Customs Service staff, for upgrading their technology and for personnel training, and raises certain fees to help offset the added expense.

The act has five other provisions. It calls for the sharing of information among several federal agencies when resolving deportation issues and adds guidelines (with statutory deadlines) regarding travel documents and the issuing of visas and passports, as well as new rules for inspecting immigrants, such as requiring airlines and passenger ships to transmit lists of arriving passengers on their way to the United States. The act also covers the tracking of foreign students by requiring the schools they attend to certify that the students have in fact enrolled and are continuing to attend. Finally, it mandates a study to determine the feasibility of annually monitoring nonimmigrants in the United States and developing a database to be shared with Canada and Mexico.

The two new laws aren't the only governmental measures to have had an impact on immigration practices and procedures. Under an executive regulation issued on October 29, 2001, the government has the power to detain an alien even after an immigration judge has ordered that person's release. According to the National Immigration Forum, a nonprofit group that promotes immigration, "The new rule will allow the INS to continue to detain aliens held even for minor immigration violations, and the detention may go on for months before the BIA [Board of Immigration Appeals] and, ultimately, the Attorney General make their decisions."

In the month after September 11, the Department of Justice issued a number of new regulations (or reinterpretations of existing regulations) that soon proved to be highly controversial. They provide for the monitoring of attorney–client communications; interviews (on a "consensual" basis) of Middle Eastern males between the ages of 18 and 33 who entered the United States after January 1, 2000,

on nonimmigrant visas; S visas for persons who offer "relevant information" that will help catch terrorists or stop terrorist attacks (opponents immediately began referring to them as "snitch" visas); and the detention of individuals in connection with the government's ongoing investigation into the terrorist attacks of September 11 (an internal Justice Department memo outlined the procedure to be used in resisting Freedom of Information Act requests regarding the individuals being held).

Reactions Pro and Con

Although these actions on the part of government, in particular their unilateral nature, brought

